Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

80-873

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

COUNTY OF MONTEREY,

RESPONDENT,

VS.

W. W. LEASING UNLIMITED, A CORPORATION,

PETITIONER.

ON APPEAL FROM THE COURT OF APPEALS OF CALIFORNIA, FIRST DISTRICT, FROM THE OPINION OF JULY 15, 1980, WHICH DECISION BECAME FINAL ON SEPTEMBER 10, 1980, WHEN THE SUPREME COURT OF CALIFORNIA DENIED A PETITION FOR HEARING.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES.

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QUESTIONS PRESENTED

1. Whether a property owner is entitled to severance damages when his property is taken for road-widening purposes and road access is substantially impaired or totally cut off as a result of the taking?

2. Whether there was substantial error by the trial court in submitting the question of the existence of severance damage to the jury where the trial judge is required to decide whether or not there was severance damage?

3. Whether appellant was entitled to a jury instruction that severance damage was established, as a matter of law, and that it was the duty of the jury merely to evaluate the amount of this damage.

4. Where the trial date was delayed at the instance of respondent/condemnor and exchanged sales information was stale, did the trial court abuse its discretion prejudicially in refusing to permit evidence of updated comparable sales which occurred subsequent to the last exchange of sales data as rebuttal evidence?

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JUDGMENT AND OPINION BELOW

The Judgment that the fair market value of the parcel taken in this case was $7,318.50 and that there were no severance damages to the remainder of the property which were caused by the taking is attached hereto as Appendix A. The Opinion of the Court of Appeal, First Appellate District, affirming the trial Court's judgment is attached hereto as Appendix B, and is reported as County of Monterey vs. W. W. Leasing Unlimited (1980) 167 Cal.Rptr. 12. Petitioner's Petition for Rehearing in said Court was denied without further opinion, and said denial is attached hereto as Appendix C. Petitioner's Petition for Hearing before the Supreme Court of California was denied without opinion, and said denial

is attached hereto as Appendix D.

JURISDICTIONAL STATEMENT

The Supreme Court of the United States has jurisdiction of this case under U. S. Supreme Court Rules, Rule 17(c) which applies when a state court of last resort has decided a federal question in conflict with applicable decisions of this Court.

Pursuant to Rule 19 of the Rules of this Court, Petitioners pray that a writ of certiorari issue to review the denial of a hearing by the California Supreme Court, following a decision by the Court of Appeal of the State of California to deny a petition for rehearing, following a decision by the Court of Appeal, First Appellate District, Division One.

An appeal to the Court of Appeal, First Appellate District, State of California, was perfected in July 1980 (County of Monterey, Respondent v. W. W. Leasing Unlimited, Appellant, No. 1/Civil 46054, First Appellate District). On April 29, 1980, the case was argued before a panel of the court of appeal. On July 15, 1980, the court of appeal affirmed the judgment of the Superior Court of California for the County of Monterey (Super. Ct. No. 72471). On August 14, 1980, the court of appeal denied a petition for rehearing and certified for publication its decision of July 15, 1980 (App., 167 Cal. Rptr. 12). On September 10, 1980, the Supreme Court of California denied a hearing.

CONSTITUTIONAL PROVISION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. amend. 5 (1791).

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U. S. Const. amend.14 §1 (1868).

STATEMENT OF THE CASE

Petitioner owned two separate parcels of land, fronting on a highway, adjacent to a major airport. The agreed and best use of each of the properties was commercial. The County of Monterey condemned all of the highway frontage of one parcel and most of the frontage of the second parcel, obtained an order for immediate possession and erected a fence between the remaining property and the road.

At the trial, two years later, the County's appraiser was allowed to testify that there was no severance damage to either parcel, because he felt that the County, later, would provide access to another road, which was not contiguous to the property. He felt they would because:

> . . . I cannot be convinced that Monterey County, Cal-Trans, who has almost a final say on access to Highway 68, would not permit the owner of the subject property to develop it, . . .

He further acknowledged that if they did not provide such access, the property is ". . . a landlocked piece; it's only good for a helicopter pad and that's all." [1]

Objections to such testimony were overruled. Over objection, the question of whether there was severance damage was erroneously submitted to the jury, [2]

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1. Appendix H, p. 26.

2. California law establishes that this is error. The judge is required to decide whether or not there is severance damage.

> In actions for the recovery of ... real property, with or without damages ... an issue of fact must be tried by a jury, unless a jury trial is waived ... Where in these cases there are issues of both law and fact, the issue of law must be first disposed of.

West Cal. Code of Civ. Proc. §592.

which decided that there was none.

The County of Monterey has never provided any substitute road access. The property owner is left with his "helicopter pad" of little or no value.

STAGE IN THE PROCEEDINGS AT WHICH FEDERAL QUESTION WAS RAISED

The federal question sought to be reviewed was raised when the County of Monterey filed its Complaint (Eminent Domain).[3] The Court's judgment, following the jury trial, found that the fair market value of the property was $7,318.50 and that Appellant was not entitled to damages for injury to the remainder of the parcel.[4]

Appellant enumerated the following as his grounds for appeal:[5] failure to award severance damages; inadequate

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3. Appendix E [Portions of Clerk's Transcript on Appeal, County of Monterey vs. W. W. Leasing. Sup. Ct. No. 72471 (1978)], p. 21.

4. Appendix A, p.2.

5. Appendix F [Portions of Appellant's Opening Brief, County of Monterey vs. W. W. Leasing, No. 1/Civil 46054 (1979)], p.23.

award; failure of the Court to permit introduction of comparable sales data by appraisal experts in rebuttal; incorrect rulings on evidentiary matters; errors in instructions; and failure of the Court to determine compensable loss of use of the parcel during the period after the immediate possession order and before the verdict.

The Court of Appeal found the grounds to be without merit and consequently affirmed the judgment of the lower Court;[6] however, the Court did agree that Appellant was correct in contending that the determination of whether substantial impairment has been established is a matter of law for the trial court to determine.[7]

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6. Appendix B, p. 5.

7. Ibid, p. 7.

The Court of Appeal found that the record did reflect not only that the trial court declined to instruct the jury that there had been impaired access but that it did so, arguably, on the erroneous premise that it was for the jury to determine whether there was impairment.[8]

The Court also found that Appellant was correct in his argument that the exclusionary provision of the Code of Civil Procedure §1258.280 applies only to the presentation of unexchanged data during the offering party's case-in-chief; however, the Court ruled that the comparables sought to be introduced by Appellant were improper rebuttal evidence.[9]

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8. Ibid., p. 8.

9. Ibid., p. 11.

REASONS FOR GRANTING THE WRIT

A. This case presents a question of basic property rights under the command of the Fifth Amendment, that private property shall not be taken for public use without just compensation, which has been made obligatory on the states by virtue of the Fourteenth Amendment and the decisions of the Supreme Court of the United States relating thereto.[10]

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10. United States v. General Motors Corp. (323 U S 373, 89 L ed (Adv 379), 65 S Ct 357.

> It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding chops it into bits, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the "market rental value" for the use of the chips so cut off. This is neither the "taking" nor the "just compensation" the Fifth Amendment contemplates.

Ibid., 156 ALR 395.

The principle is the same here as in the General Motors case. The government has taken what it wanted, leaving an isolated remainder, diminished in value, while refusing to compensate for the damage to the remainder.

A property owner, whose property with road access is taken for road-widening purposes, is entitled to severance damages when the remainder of his property is denied access to the road (or any road) as the result of the taking. Left standing, the decision of the Court of Appeal, and the subsequent decision of the Supreme Court of the State of California to deny a hearing, undermines a long line of judicial precedents, guaranteeing the right to severance damages.

The California Supreme Court in 1942 in Rose v. State established that an

owner of property abutting a public street has a property right in the street or highway for purposes of ingress and egress [11] and in 1943 declined to question or disturb that rule. [12] The Court held in 1964 in Breidert v. Southern Pacific Company [13] that it had long recognized that the urban landowner enjoys property rights in the street upon which his land abuts. Chief among these is an

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11. Rose v. State (1942) 19 C2d 713, 123 P2d 505. The Court found that the plaintiffs, as abutting owners on Jackson Street, possess as a matter of law ... a private right or easement fo the purposes of ingress and egress to and from their lot, which right may not be taken away or destroyed or substantially impaired without just compensation therefor.

12. Bacich v. Board of Control of California (1943) 23 C2d 343, 144 P2d 818. The Court held that it was not inclined to question or disturb the rule that the right of access over the street to and from one's property has long been recognized and that compensation must be given for an impairment thereof.

13. Breidert v. Southern Pacific Company (1964) 61 C2d 659, 394 P2d 719.

easement of access in such street.

The decision of the Court of Appeal also undermines a long line of judicial precedents in other states. The Texas Supreme Court has said that:

> It is well settled that this section of the (Texas) Constitution not only prevents the taking of the property of a citizen for public purposes in the physical sense, until paid for, but that it comprehends such damages as may be peculiar to or suffered by the property involved.[14]

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14. Hanks v. Port Arthur [—Tex.—, 48 S.W. (2d) 944.]. The Court declared:

> We think the provision of the charter quoted void, because in violation of the Bill of Rights, sections 13 and 17, article 1 of the state Constitution. The first section named is the due process clause, and will be hereafter quoted. Section 17, in so far as here involved, reads as follows: "No person's property shall be taken, damaged or destroyed for, or applied to, public use without adequate compensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money."

83 ALR 281.

In 1927, the South Carolina Supreme Court said:

> Causing such depreciation is clearly destroying or taking property. (emphasis theirs) Property is not only ownership of particular lands or chattels, but it embraces the value they have by reason of their legal relations to all other things. ... An abutting landowner has a special property right in the benefits derived from the street on which his land is situated, by reason of its relation to the street, which differs in kind and degree from the interest of the municipal public, and the destruction or any impairment of these benefits for other than street purposes, which materially lessens its value, is taking private property.[15]

The Minnesota Supreme Court in 1925 said:

> It was rather the purpose of the change to make the law of damages uniform, so that a property owner may recover against persons or corporations having power of eminent domain, under the same circumstances that would have authorized recovery against one not armed with power.[16]

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15. White v. Southern R. Co. (142 S.C. 284, 140 S.E. 560.

16. Re Hull (163 Minn. 439, 204 N.W. 534).

Appellant property owner was damaged in two ways: First, by the actual taking of a portion of his real property; Second, by damage to the remaining real property left in his ownership in a less valuable and unusable condition. There was some compensation for the first, but none for the second. This was a "special damage" with respect to the property, in excess of that sustained by the public generally. Accordingly, just compensation is mandated under the Constitution. Chicago v. Taylor, 125 U.S. 161, 31 L ed 638, 8 S Ct 820, 26 Am Jur 2d 829. This Federal law has been adopted and incorporated into the legislative and decisional law of California. Albers v. County of Los Angeles, 62 Cal 2d 250, 42 Cal. Rptr. 89, 398 P 2d 129.

> As to what constitutes "damage" within the meaning of constitutional guaranties, the rule which has

> received the most support in actual application is that compensation is required not only when there is an injury that would be actionable at common law, but also in all cases in which it appears that there has been some physical disturbance of a right, either public or private, which the owner of a parcel of land enjoys in connection with his property and which gives to it an additional value, and that by reason of such disturbance he has sustained a special damage with respect to his property in excess of that sustained by the public generally. Any definite physical injury to land or an invasion of it cognizable to the senses, depreciating its market value, is a damage in the constitutional sense, regardless of whether it is such an injury as a neighboring owner might inflict without liability at common law. It is not necessary that damages shall be caused by trespass or an actual physical invasion of the real estate, but if the construction and operation of the improvement are the cause of the damage, although consequential, the party may recover.[17]

B. At trial, two years after the condemnation, the County's appraiser was

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17. 26 Am Jur 2d §160, 829-830.

allowed to testify that there was no severance damage to either parcel, because he felt that the County would provide access in the future. The question of whether there was severance damage should have been decided by the Judge, as a matter of law.[18]

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18 West Cal. Code of Civ. Proc. §§591, 592.

§591. Issue of law; trial An issue of law must be tried by the court, unless it is referred upon consent;...

§592. Issue of fact; jury trial; waiver; reference; issues of law disposed of first

In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of.

West Cal. Evid. Code. §310.

§310. Questions of law for court. (a) All questions of law (including but not limited to questions concerning the construction of statutes and other writings, the admissibility of evidence, and other rules of evidence are to be decided by the court as provided in Article 2...

Since it is beyond doubt that the taking did occur, the issue for the jury was to measure the value of the taking in terms of its effect on the remainder of the property.[19]

Appellant's experts testified to substantially higher amounts as both take and severance values, but the jury, properly instructed, was bound to determine some value for severance damages, as a matter of law. It was legally impermissible for the jury to find no severance damages under the undisputed facts of this case.[20]

C. The fact that the jury found no severance damages is evidence of (1) the confusion surrounding the instructions and (2) the many errors on evidentiary

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19. Ibid., CCP §592.

20. Ibid.

rulings. The Court inadvertently failed to instruct on comparison of access before and after the taking and then declined to give the instruction, despite its own prior contrary ruling, when the omission was brought to its attention.

> MR. WEINGARTEN: It could be restated that we are saying that there is no access. The plaintiff has already said they're going to contend that there is, and so that our argument would be that we believe that there is none, that the evidence establishes this, but that in any event, that there is injury.
>
> THE COURT: Well, all right. I guess that's a plausible theory. All right. I think I'll give it.[21]
>
> ...
>
> THE COURT: Oh, I'm not going to give that because -- I deliberately left that out because I think it is generally -- it was not argued for one thing. I had that in mind this morning...[22]

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21. Appendix H (Portions of Reporter's Transcript on Appeal), p. 26.

22. Ibid., p. 27.

D. It was prejudicial error for the Court to refuse to allow the use of recent sales data on rebuttal. Given the facts of a very old condemnor's appraisal and the trial delays occasioned solely by Respondent County of Monterey, there was good reason to permit evidence of comparable sales which occurred subsequent to the last exchange. This was a matter within the discretion of the court as to the case in chief. The fact of the sales, here within the period of about nine months prior to trial, is relevant to show (1) the existence of sales activity, (2) the lack of investigation and lack of thoroughness on the part of the opposing valuation expert, and (3) the indication of value as derived from the elements of comparability. Each of these is a proper purpose of rebuttal. There is no rule of exclusion of sales data

used in rebuttal.[23] Where there is evidence of a valid reason for the late exchange, the court may exercise its discretion to allow such comparables during the case in chief, with conditions it believes are equitable.[24]

The trial court extended the doctrine of Cal. Code of Civ. Proc. §1258.280 far beyond its stated wording and beyond its intent as stated by the Law Revision Commission Comments to this section of the Code. The penalty of exclusion from rebuttal evidence is not consistent with the statute and is unduly harsh.

If left undisturbed, the opinion of the Court of Appeals, as published, will stand for the proposition that the trial

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23. West's Cal. Code of Civ. Proc. §1258.290.

24. Ibid., §1258.280.

court may exclude from rebuttal all unexchanged sales data, regardless of its relevance to the case in chief it is intended to rebut. Neither appellant nor respondent, nor the Court of Appeal, has found and cited any prior case extending the exclusionary provisions of CCP §1258.290 to this extent.[25]

These are matters of major importance in condemnation trial practice and procedure and substantially first impression precedents established by this case.

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25. Condemnation Practice in California (CEB) (1973), p. 203.

Note that these limitations apply only to the "case in chief," undisclosed witnesses and valuation data may be used for purposes of rebuttal (emphasis added).

CONCLUSION

The taking of the right of access to the sole public road appurtenant to real property is compensable damage to remainder property which is owned by a condemnee.

There was substantial error by the trial court in failing to rule on the question of severance damage and then in failing to instruct the jury correctly in the law relating to such taking. The taking without severance damage compensation was a deprivation of petitioner's Fifth and Fourteenth Amendment rights.

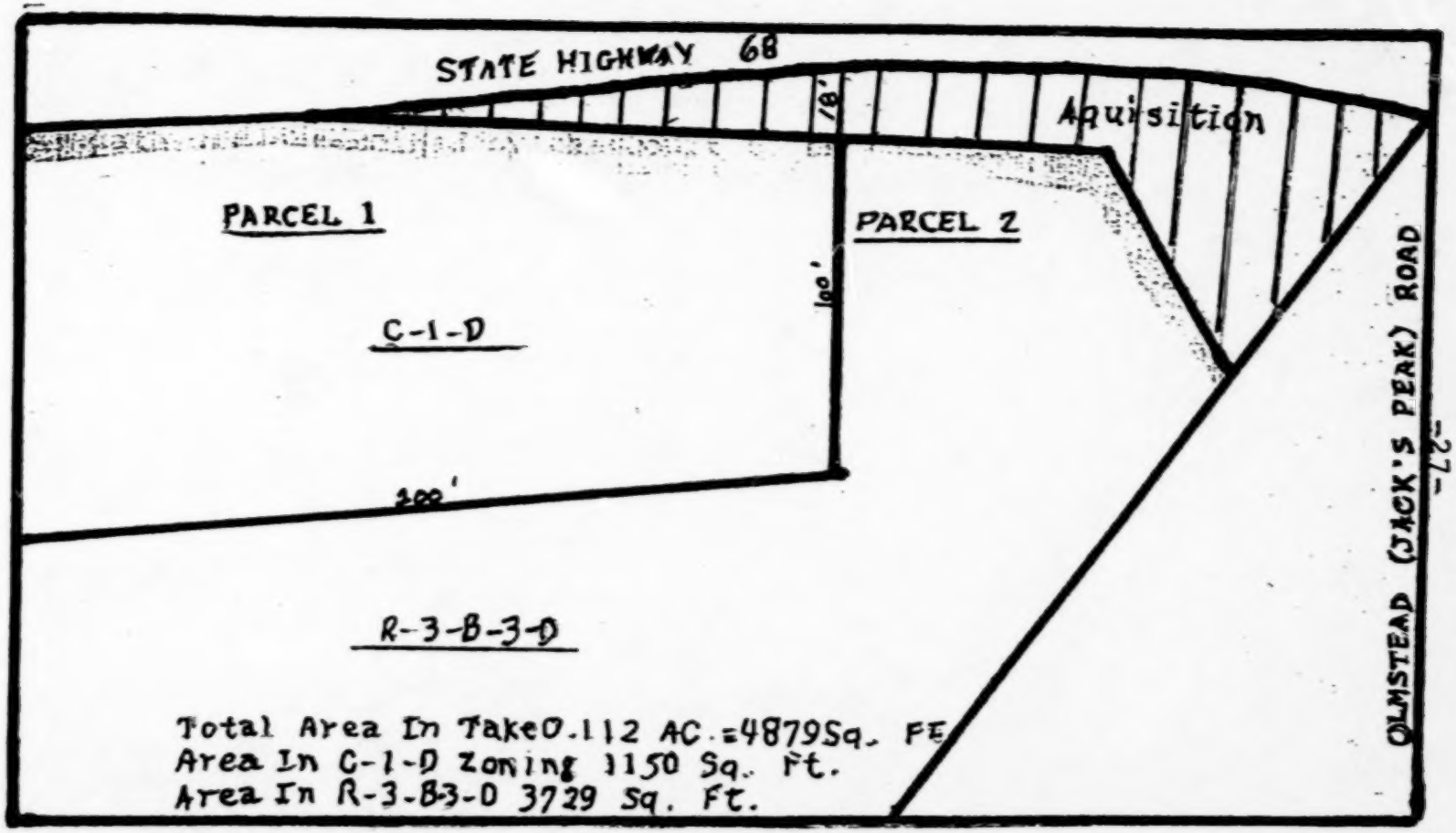
Petitioner requests this Honorable Court issue its Writ of Certiorari and for such other and further orders and directives of this Honorable Court as

may be just in these premises.

Respectfully submitted,

Saul M. Weingarten

SAUL M. WEINGARTEN
Attorney for Petitioner


STATE HIGHWAY 68
78'
Aquisition
PARCEL 1
PARCEL 2
100'
C-1-D
200'
R-3-B-3-D
OLMSTEAD (JACK'S PEAK) ROAD
Total Area In Take 0.112 AC. = 4879 Sq. FE
Area In C-1-D Zoning 1150 Sq. Ft.
Area In R-3-B3-D 3729 Sq. Ft.

APPENDIX A.

Judgment.

In the Superior Court of the State of California, In and For the County of Monterey.

County of Monterey, Plaintiff, vs. W. W. Leasing Unlimited, a corporation, et al., Defendants. No. 72471.

This cause came on regularly for trial on June 26, 1978 at 9:30 a.m.; Jose Rafael Ramos appeared as counsel for Plaintiff and Saul M. Weingarten appeared as counsel for Defendants. Thereupon a jury of 12 persons was duly accepted, impaneled, and sworn to try said cause. Witnesses on the part of the Plaintiff and Defendants were duly sworn and examined.

Whereupon, after hearing the evidence, the arguments of counsel and instructions of the Court, the cause was submitted to the jury, who retired to deliberate upon its verdict, and subsequently turned into Court, and then rendered the following verdict, which was accepted by the Court and entered in the minutes as follows: "We, the Jury, in the above-entitled case, find as follows:

1. The fair market value of the parcel taken in this case is: $7,318.50.
2. Were severance damages to the remainder of the property caused by the taking NO."

WHEREFORE, by reason of the law and the premises aforesaid,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff's title in the real property which is the subject of this suit is confirmed and is described as in Exhibit A which is made a part hereof.
2. The above-described property be and

hereby is condemned to Plaintiff, provided that compensation and costs of suit as set forth below are paid or deposited within 30 days from the date of this judgment, pursuant to California Code of Civil Procedure, section 1268.010.

3. On timely payment or deposit of the amount of this judgment, or on satisfaction thereof, the court shall, on application of any party, make its final order of condemnation.

4. The property described above is condemned to Plaintiff in fee simple absolute.

5. On June 26, 1978, the date of valuation, the fair market value, as determined by the jury, of the property described above was $7,318.50.

6. The property described above is part of a larger parcel and, in addition to the fair market value of the property taken, Defendant W. W. Leasing is not entitled to damages for injury to the remainder of the parcel.

7. Defendant W. W. Leasing recover costs in this proceeding in the amount of $186.00.

Dated: October 6, 1978.

/s/ Preston Devine
Justice, Court of Appeal,
1st District, sitting Pro Tem
as Judge of the Superior Court

LEGAL DESCRIPTION

Situate in Monterey City Lands, Monterey County, California and being a portion of that certain parcel of land designated as Parcel 1 by Trustee's Deed from Patricia Lane to W. W. Leasing Unlimited dated October 31, 1972, and recorded in Reel 806 of Official Records at page 1078 records of Monterey County, and being described as follows:

BEGINNING at a point on the southerly boundary of the Salinas-Monterey State Highway, Route 68 from which a found 2" iron pipe with tag RE 707 standing on the northerly boundary of said State Highway and southerly boundary of Parcel 11 as said 2" pipe, Highway, and parcel are shown and so designated on sheet No. 4 of "Map of Tract No. 370 'Del Monte Research Park' Being a Subdivision of Portions of Aguajito Rancho and Monterey City lands No. 1---" filed for record August 10, 1960, in Volume 7 of Cities and Towns at page 19, records of Monterey County bears N. 9° 10' 13" W., 80.00 feet distant; thence from said point of beginning and along the northerly boundary of said State Highway and curving

1) Easterly along an arc of a circular curve to the right (the center of said curve bears S. 9° 10' 13" E., 1,460 feet distant) through a central angle of 10° 04' 47" for an arc length of 256.85 feet to a point of intersection with the common boundary between Rancho Saucito and Monterey City lands; said point of intersection also being the most northwesterly corner of that certain 100' strip of land designated as "Exhibit C" by Grant Deed from Del Monte Properties Company to

Monterey County dated June 29, 1971, and recorded in Reel 711 of Official Records at page 1026 records of Monterey County; thence along said common boundary between Rancho Saucito and Monterey City lands No. 1 and westerly boundary of said Exhibit "C"

2) S. 33° 03' 23" W., 63.76 feet (S. 31° 19' W. per Exhibit "C"); thence leaving said boundary

3) N. 47° 35' 39" W., 48.69 feet; thence

4) S. 89° 29' 05" W., 210.00 feet to a point on said southerly boundary of State Highway, Route 68; thence along said boundary

5) N. 80° 49' 47" E., 25.19 feet to the point of beginning.

Containing an area of 0.112 of an acre of land.

Bearings and distances shown are based on the California Coordinate System, Zone 4. Multiply distance by 1.0000967 to obtain ground level distances.

EXHIBIT A

APPENDIX B.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, First Appellate District, Division One.

County of Monterey, Plaintiff and Respondent, vs. W. W. Leasing Unlimited, a corporation, Defendant and Appellant. 1 Civil 46054 (Super. Ct. No. 72471).

Filed: July 15, 1980.

In a proceeding in eminent domain brought by the County of Monterey the jury awarded W. W. Leasing, Unlimited, owner of the condemned property at the time the proceeding was instituted, the sum of $7,318.50. W. W. Leasing appeals from the judgment on various grounds. We find them to be without merit, and consequently affirm.

1. Alleged error in failing to instruct that appellant had suffered severance damages through impairment of access.

Appellant was the owner of real property located in the County of Monterey near the intersection of Highway 68 and Olmstead Road. The property consisted of two parcels: one a parcel of 20,000 square feet which was zoned commercial, and the other a parcel which was zoned for "transient residential use. The former parcel had frontage on Highway 68, which was marked so as to allow access by vehicles traveling both east and west on the highway. In 1974 the county began negotiations for the condemnation of a strip of appellant's land contiguous to Highway 68 and consisting of 0.112 acres of 4,879 square feet, for the purpose of providing a "deceleration lane" on

Highway 68 and to accommodate the construction of Olmstead Road, which at that time existed only on the north side of the highway. The portion to be condemned did not include the designated access off the highway. Negotiations were unsuccessful, and in April 1976 the county instituted this proceeding. Upon the deposit of $5,000 as security, the county obtained an order for immediate possession.

In January 1977 appellant contracted for the sale of both parcels to one Leo Copper for $90,000, reserving the right to proceeds from the condemnation proceeding. In March 1977 Copper applied to reclassify the residentially zoned parcel to a commercial designation, C-1-D. That application was not granted, but instead, in August 1977, the board of supervisors accepted a recommendation of the county zoning administrator that the entire property be zoned H-1, allowing for commercial use only with a use permit. In September 1977 the sale from appellant to Copper was consummated, and shortly thereafter Copper applied for a use permit to allow for construction and maintenance of a restaurant on the property. The zoning administrator granted the permit on the condition that access to the restaurant be from Olmstead Road, and not from Highway 68. The zoning administrator testified in the trial of this matter that the condition was imposed because in his opinion restaurant access from the highway would be dangerous, and that the condition was in no way related to the pending condemnation proceeding. Copper testified that he was aware of access problems when he entered into the contract

for sale, that access from the highway would have been inadequate even if it had been permitted, and that he preferred access from Olmstead Road, which he was seeking to obtain. The only valuation witness who testified concerning access at the trial was the county's witness, who expressed the opinion that access to appellant's property was not adversely affected by the taking, and that in fact it may have been improved as a result of the county's work on Olmstead Road.

Appellant contends that the trial court erred in failing to instruct the jury that appellant's right of access was impaired by reason of the condemnation. It was well established, of course, that a substantial and unreasonable impairment of access in connection with a taking entitles the owner to severance damages for the depreciation in value of the remainder. (E.g., Breidert v. Southern Pac. Co. (1964) 61 Cal.2d 659, 663; People v. Ricciardi (1943) 23 Cal.2d 390; People ex rel. Dept. Pub. Wks. v. Silveira (1965) 236 Cal.App.2d 604.) Appellant is also correct in contending that the determination of whether such substantial impairment has been established is a matter of law for the trial court to determine, leaving the determination of the extent of the impairment to the jury. (Breidert v. Southern Pac. Co., supra, at p. 664; see also Wagner v. State of California ex rel. Dept. Pub. Wks. (1975) 51 Cal.App.3d 472, 479; Riverside County Flood etc. Dist. v. Halman (1968) 262 Cal.App.2d 510, 516; People ex rel. Dept. of Public Works v. Wasserman (1966) 240 Cal.App.2d 716, 728; People ex rel. Dept. of Pub. Wks. v. Presley (1966) 239 Cal.

App.2d 309, 313.) And the record does reflect not only that the trial court declined to instruct the jury that there had been impaired access but that it did so, arguably, on the erroneous premise that it was for the jury to determine whether there was impairment. But assuming that the trial court's failure to give the requested instruction stemmed from that erroneous premise, a question still remains whether as a matter of law such an instruction was called for under the circumstances. Impaired access severance damages, by definition, are those which arise from the taking. (Code of Civ. Proc., §1263.420.) Further, the right to severance damages is to be determined with reference to the time the condemnation is commenced. (People ex rel. Dept. Pub. Wks. v. Simon Newman Co. (1974) 37 Cal.App.3d 398, 404.) There is simply no evidence in the record to indicate that there was any substantial impairment of access arising out of the taking.[1]

Rather, to the extent that prior access was impaired, all the evidence indicates the impairment was a product of the rezoning actions which occurred subsequent to the commencement of the action. Where the judgment is " 'the only proper one in the state of the record,'" even substantial error is not reversible. (6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 315, p. 4293.) That is the situation here. Failure to give the requested instruction was not prejudicial error.

2. Alleged error in excluding evidence of recent valuation data.

In valuing the property taken, both

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1. Footnote next page.

appellant's and respondent's expert witnesses made reference to the sales of comparable properties ("comparables"). Under the terms of Code of Civil Procedure sections 1258.210 through 1258.300, the parties were required to exchange data pertaining to such comparables 40 days prior to commencement of the trial. The penalty for failure to comply with

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1. It does not appear from the record whether access to that portion of the remaining property contiguous with the taken portion was physically impaired, but even if it were, that would be irrelevant if such access could be legally have been used in conjunction with what would otherwise be the highest and best use of the parcels. According to the county's valuation witness, the latter is the case. He testified "Any access that the property had and has had for its highest and best use is no different today than what it was at that time; in fact, it could be a better access situation today, because prior and in the before condition, Jacks Peak [Olmstead] Road did not exist. . . .The access, if it were not permitted to the property from Highway 68 in the before condition, that is no different than it would be today."

There was no rebuttal to this testimony. Appellant called two valuation experts, but neither testified to diminution of access, or related any portion of their valuation to diminution of access. Rather, both of them testified generally to a reduction of value to the remaining parcels because of a change in size and shape of the property.

this requirement is exclusion of evidence of the comparables at least from the offering party's case-in-chief. (Code Civ. Proc., §1258.280.) Here, the comparable sales originally used by appellant's first witness, Mrs. Arnold, were properly exchanged. Mrs. Arnold, had, however, made her appraisal in December of 1977. Apparently, trial had at that time been set for January of 1978. After the January trial date was continued, apparently at respondent's request, Mrs. Arnold did further research and discovered several new comparables. These new comparables were not exchanged with respondent pursuant to the statutory procedure. Respondent first learned of them when appellant elicited the testimony of Mrs. Arnold at the original trial which commenced on June 19, 1978, and ended in a mistrial on June 21. It was the introduction of evidence concerning those comparables which provoked the court in the original trial to grant a mistrial.

A similar situation arose with respect to comparables relied upon by appellant's second valuation expert, one Samuelson. This expert had made his appraisal after the continuance of the January trial date. Appellant submitted the appraisal report to respondent but neglected to attach a list of the comparables upon which the expert had relied.

When the second trial began on June 26, 1978, appellant attempted to introduce testimony from Mrs. Arnold concerning the unexchanged comparables. At first laboring under the misapprehension that the comparables were not new but had merely been updated, the court allowed Mrs. Arnold's testimony to begin. When

the court realized that the new comparables were just that, it sustained respondent's objection to them. In chambers, counsel for appellant argued that the court should admit the comparables -- those used by Arnold and those used by Samuelson -- in an exercise of its discretion under Code of Civil Procedure section 1258.290.[2] The court rejected the argument.

Subsequently, appellant's counsel attempted to persuade the court that the comparables were admissible on cross-examination of respondent's valuation witness and in rebuttal. Although the court allowed limited cross-examination of respondent's witness as to whether he had considered the subject comparables in making his valuation, the court refused to allow testimony concerning the comparables in rebuttal. In sustaining respondent's objection to use of the Samuelson comparables on rebuttal, the court stated that it did so "not only upon the ground of the Code of Civil Procedure but under the inherent power of the court in respect of discovery procedure."

Appellant here contends the trial court erred in ruling that the comparables were not admissible in rebuttal. This contention is without merit.

Appellant is correct in the argument that the exclusionary provision of Code of Civil Procedure section 1258.280 applies only to the presentation of unexchanged data during the offering

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2. Footnote on next page.

party's case-in-chief. This seems clear from the relevant terms of the

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2. Section 1258.290 provides: (a) The court may, upon such terms as may be just (including but not limited to continuing the trial for a reasonable period of time and awarding costs and litigation expenses), permit a party to call a witness, or permit a witness called by a party to testify to an opinion or data on direct examination, during the party's case in chief where such witness, opinion, or data is required to be, but is not, included in such party's list of expert witnesses or statements of valuation data if the court finds that such party has made a good faith effort to comply with Sections 1258.210 to 1258.260, inclusive, that he has complied with Section 1258.270, and that by the date of exchange he:

"(1) Would not in the exercise of reasonable diligence have determined to call such witness or discovered or listed such opinion or data; or

"(2) failed to determine to call such witness or to discover or list such opinion or data through mistake, inadvertence, surprise, or excusable neglect.

"(b) In making a determination under this section, the court shall take into account the extent to which the opposing party has relied upon the list of expert witnesses and statements of valuation data and will be prejudiced if the witness is called or the testimony concerning such opinion or data is given."

section[3] and is further supported by the Law Revision Commission Comments to the section which read in pertinent part: "Section 1258.280 is the same in substance as former Section 1272.05. Section 1258.280 provides a sanction calculated to insure that the parties make a good faith exchange of lists of expert witnesses and essential valuation data. . . . [¶] Section 1258.280 limits only the calling of a witness, or the presentation of testimony, during the case in chief of the party calling the witness or presenting the testimony. The section does not preclude a party from calling a witness in rebuttal or having a witness give rebuttal testimony that is otherwise proper. See City & County of San Francisco v. Tillman Estate Co., 205 Cal. 651, . . .; State v. Loop, 127 Cal.App.2d 786,. . . The section also

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3. The relevant terms are contained in section 1258.280, subdivision (c): "Except as provided in Section 1258.290, upon objection of a party who has served his list of expert witnesses and statements of valuation data in compliance with Section 1258.230: . . .

"(c) No witness called by a party required to serve statements of valuation data on the objecting party may testify on direct examination during the case in chief of the party who called him to any opinion or data required to be listed in the statement of valuation data for such witness unless such opinion or data is listed in the statement served except that testimony that is merely an explanation or elaboration of data so listed is not inadmissible under this subdivision."

does not preclude a party from bringing out additional data on redirect examination where it is necessary to meet matters brought out on the cross-examination of his witness. However, the court should take care to confine a party's rebuttal case and his redirect examination of his witnesses to their purpose of meeting matters brought out during the adverse party's case or cross-examination of his witnesses. A party should not be permitted to defeat the purpose of this article by reserving witnesses and valuation data for use in rebuttal where such witnesses should have been called and such valuation data presented on the direct examination during the case in chief." (See also Condemnation Practice in Cal. (Cont.Ed. Bar.) §9.7, p. 203.)

It is clear from those comments, however, that the concept of "rebuttal" is not to be used in derogation of the requirement that data be exchanged pursuant to the prescribed procedures. It is well established that rebuttal evidence does not properly consist of additional opinion evidence concerning valuation. Rather, it must be concerned with and address new matter brought out by the opposing party. (Compare People ex rel. Dept. of Public Works v. Donovan (1962) 57 Cal.2d 346, 357, with People v. Loop (1954) 127 Cal.App.2d 786, 801-802. See also Condemnation Practice in Cal., supra, § 9.61, p. 247.) The comparables sought to be introduced by appellant were, under this rule, improper rebuttal evidence in that they were simply additional evidence on the question of value.

In arguing that the comparables were proper subjects for rebuttal appellant concentrates primarily on the facts that the trial herein had been delayed and that the valuation by respondent's expert was two years old. Appellant states the comparables were relevant on rebuttal "to show 1) the existence of sales activity [subsequent to the appraisal made by respondent's expert], 2) the lack of investigation and lack of thoroughness on the part of [that expert], and 3) the indication of value as derived from the elements of comparability." As to the last of these asserted bases of relevance on rebuttal -- the indication of value -- this was precisely the issue which appellant was required to and did address in its case-in-chief. As to the other asserted bases of relevance, appellant successfully brought out evidence concerning these subjects despite the court's ruling that the comparables were not admissible. In testifying on redirect, respondent's valuation expert testified that he had "not made an investigation of the movement of prices" because from his experience he felt that such movement did not exist. In response, appellant introduced testimony from Arnold and Samuelson that in the relevant time span commercial property of the sort in question had indeed increased in value. Further, in cross-examining respondent's expert, appellant elicited testimony that the expert had not relied on the subject comparables in making his appraisal and thus brought to the jury's attention the expert's alleged "lack of investigation and lack of thoroughness."

We conclude that appellant was allowed fair scope for rebuttal and that the court properly excluded from such rebuttal the unexchanged data on comparables.

3. Alleged lack of evidence to support the jury's valuation.

Appellant contends the jury's valuation of the property is not supported by the evidence in that it was based on a valuation made by respondent's expert which was dated by two years.

The valuation evidence was basically as follows. Respondent's expert, Mr. Brodd, valued the property at $1.50 per square foot as of the date of trial for a total of $7,318.50 for the 4,879 square feet taken. His opinion on value was based in part on comparable sales which had occurred some years prior to trial. On cross-examination Brodd acknowledged "a general increase in the value of commercial property on the Monterey Peninsula during the past five years." On redirect, however, he explained that while other types of property had increased in value over the years "the increases that I see in commercial properties are almost non-existent, for the reason that with the cost of building shopping centers, restaurants, and whatever, today, with the already great number of them that we have, there is not that great demand for commercial type properties."

Both of appellant's experts disagreed with Brodd's opinion that commercial properties in the subject area had not increased in value in recent years. They also disagreed with Brodd's valuation. Arnold assigned a value of $6.50 per square foot; Samuelson valued the property at $3 per square foot.

It is evident from the jury's verdict awarding appellant $7,318.50 that it accepted the opinion of respondent's witness who testified that his valuation was current. The determination of value was a question for the jury. (Cal. Const., art. I, § 19.) It rested with the jury to determine the credibility of the expert witnesses and to resolve conflicts in their opinions. (See City of Carlsbad v. Wight (1963) 221 Cal.App. 2d 756, 763; People v. Loop, supra, 127 Cal.App.2d at p. 800.) We conclude the jury's award is supported by the evidence.

4. Alleged error in finding no compensable loss of use.

Appellant argued to the trial court that it was entitled to damages for "loss of use of possession" during the 27 months between the time this action was commenced and the date of trial. The parties stipulated that the question of entitlement was one for the court as a matter of law, and they agreed upon a formula for determining loss if entitlement was found. The trial court found no compensable loss of use, and appellant contends that was error. It argues that appellant "had the burden, but not the benefit" of the property during the 27-month period, and was therefore entitled to compensation for the value of the use.

The only authority cited by appellant in support of this contention is Sacramento & San Joaquin Drainage Dist. v. Goehring (1970) 13 Cal.App.3d 58, which applied the principle that a property owner is entitled to compensation for a temporary taking (in that case, a temporary easement for road purposes), as distinguished from a permanent taking

through condemnation. That principle has no application here. This is not a case involving "inequitable precondemnation activities," as where the public authority unreasonably delays eminent domain action following an announcement of intent to condemn or otherwise engages in unreasonable conduct prior to condemnation (cf. Klopping v. City of Whittier (1972) 8 Cal. 3d 39.) Respondent was entitled to take immediate possession (Cal. Const., art. I, § 19; Code Civ. Proc., §§1255.410 - 1255.480), and from that date respondent bore the obligation to pay interest on the condemnation judgment (Code Civ. Proc., § 1268.310) to pay taxes on the property (Rev. & Tax. Code, §5082), and to bear the risk of loss (see Redevelopment Agency v. Maynard (1966) 244 Cal.App.2d 260, 265; Civ. Code, § 1622). No additional compensation is required.

The judgment is affirmed.

GRODIN, J.

WE CONCUR:

RACANELLI, P.J.

NEWSOM, J.

APPENDIX C.

Court of Appeal of the State of California, In and For the First Appellate District, Division One.

County of Monterey, Plaintiff and Respondent, vs. W. W. Leasing Unlimited, a corp., Defendant and Appellant.

No. 46054.

Filed: August 14, 1980.

BY THE COURT:

The petition for rehearing is denied.

Dated August 14, 1980.

RACANELLI, P.J.

APPENDIX D.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

Sep 10 1980

I have this day filed Order
HEARING DENIED

In re: 1 Civ. No. 46054

County of Monterey
vs.
W. W. Leasing Unlimited.

Respectfully,

Clerk

APPENDIX E.

Complaint (Eminent Domain).

Superior Court of the State of California, County of Monterey.

County of Monterey, Plaintiff, vs. W. W. Leasing Unlimited, a corporation, Raymond E. Pasquinucci, Lorene L. Pasquinucci, The First Monterey Company, a corporation, Monterey Savings and Loan Association, a corporation, and Doe One to Doe Ten, Defendants. No. 72471.

Plaintiff complains of defendants and for cause of action alleges:

1. That plaintiff is, and at all times mentioned herein was, a political subdivision of the State of California, and as such is authorized to prosecute this proceeding under Title 7, Part 3 of the Code of Civil Procedure; that plaintiff is in charge of a public use, namely, county highways within the territorial limits of the County of Monterey, State of California, and seeks to condemn the fee in the real property hereinafter described for such county highway purposes, and proposes to devote said property to said use.

APPENDIX F

Appellant's Opening Brief

Court of Appeal of the State of California, First Appellate District, Division One.

County of Monterey, Plaintiff and Respondent, vs. W. W. Leasing Unlimited, a corporation, Defendant and Appellant. No. 1/Civil 46054.

Appellant's Opening Brief, From a Judgment of the Superior Court of California, County of Monterey, Before the Honorable Preston Devine, Judge Pro Tempore, And a Jury, Judgment Entered: October 9, 1978.

Statement of the Case. This is an action in eminent domain, filed by the Plaintiff, County of Monterey, on April 12, 1976 (Clerk's Transcript, Page 2), at which time an order for immediate possession was obtained (CT 9-14). All Defendants, other than Appellant, disclaimed (CT 15-18), or were otherwise eliminated from the action. Appellant answered the complaint on June 25, 1976 (CT 19-21). A pretrial conference was held on May 12, 1978, and a jury trial commenced on June 19, 1978 (CT 26-28), ending in a mistrial on June 21st. A second trial commenced on June 26th, resulting in the verdict from which this appeal is taken (CT 34). Notice of intention to move for new trial was filed on July 10th (CT 36). However, the judgment was not filed until October 9th (CT 57) and the Notice of Appeal was filed on October 12th (CT 63). On October 18th, the Court declined to consider the motion for new trial by reason of lack of jurisdiction (CT 75).

Appellant's principal grounds for appeal are concerned with error in the following respects:

(1) Failure to award severance damages.
(2) Inadequate award.
(3) Failure of the Court to permit introduction of comparable sales data by appraisal experts in rebuttal.
(4) Incorrect rulings on evidentiary matters.
(5) Errors in instructions.
(6) Failure of the Court to determine compensable loss of use of the parcel during the two years and three months elapsing after the immediate possession order and before the verdict.

APPENDIX G.

Before the Board of Supervisors in and for the County of Monterey, State of California.

Condemnation of property for county highway. . . RESOLUTION No. 76-173.

BE IT RESOLVED by the Board of Supervisors of the County of Monterey, State of California:

1. That it finds and determines that the public interest and necessity require the acquisition, construction and completion by said county of a public improvement, namely, a county highway, and that the public interest and necessity require the acquisition for and in connection with said public improvement of the real property, or interests in real property, in said county and state, hereinafter described.

2. That the County Counsel of the County of Monterey is authorized and directed (a) to acquire, in the name of the County of Monterey, a fee simple estate, unless a lesser estate is hereinafter expressly described, in and to the said hereinafter described real property, or interests in real property, and to prosecute such proceedings in eminent domain as may be necessary therefor; (b) to apply to the proper court for an order permitting said county to take immediate possession and use of such property or interests therein; (c) to cause to be drawn and issued, payable to the order of the clerk of such court, a warrant or warrants upon the road fund of said county, in such amount or amounts as may be fixed by such court, to secure to the owner or owners of said property or interests therein the payment of all compensation provided by law;

(d) to deposit such warrant or warrants with such court, to abide its further order.

3. That the real property or interests in real property above referred to is described as follows:

[SEE EXHIBIT A OF APPENDIX A]

Upon motion of Supervisor Petrovic, seconded by Supervisor Norris, the foregoing resolution was adopted the 6th day of April, 1976, by the following vote:

Aye: Supervisors Church, Norris, Petrovic, Poyner

No: None

Absent: Supervisor Farr

APPENDIX H.

Reporter's Transcript on Appeal.

Court of Appeal of the State of California, In and For the First Appellate District.

County of Monterey, Plaintiff and Respondent, vs. W. W. Leasing Unlimited, a corporation, Defendant and Appellant. Civil No. 46054 (Monterey County Superior Court No. 72471).

FROM PAGE 256, LINES 21-24:

THE WITNESS: . . .So I cannot be convinced that Monterey County, Cal-Trans, who has almost a final say on access to Highway 68, would not permit the owner of the subject property to develop it, even if Jacks Peak Road were not there.

FROM PAGE 318, LINES 25-26:

THE WITNESS: Then it's a landlocked piece; it's only good for a helicopter landing pad and that's all.

FROM PAGE 382, LINES 22-23:

THE COURT: Well, all right. I guess that's a plausible theory. All right. I think I'll give it.

FROM PAGE 451, LINE 26 to PAGE 452, LINE 1:

THE COURT: Oh, I'm not going to give that because -- I deliberately left that out because I think it

is generally -- it was not argued, for one thing. I had that in mind this morning. . . .

DECLARATION OF MAILING

I, the undersigned, declare:

I am a citizen of the United States, employed in Monterey County, State of California, over the age of 18 years, and not a party to the above-entitled cause. My business address is Fremont Professional Center, Seaside, CA 93955. I served the foregoing document by depositing a true copy thereof in the United States mails in Seaside, State of California, on November 26, 1980, enclosed in a sealed envelope with the postage thereon fully prepaid, addressed as follows:

Ralph Kuchler, County Counsel
County of Monterey, Courthouse
P. O. Box 1587
Salinas, California 93901 (3 copies)

Circuit Judges Grodin, Racanelli and Newson, c/o Clerk, U. S. Court of Appeals for the Ninth Circuit
U. S. Court of Appeals and
Post Office Building
7th and Mission Streets
P. O. Box 547
San Francisco, California 94101

Hon. Preston Devine, Justice, Court of Appeal, 1st District, sitting Pro Tem as Judge of the Superior Court for the County of Monterey,
2711 Scott St.
San Francisco, California 94123

Supreme Court of California
c/o Clerk
4250 State Building
San Francisco, California 94102

Executed on November 26 , 1980, at Seaside, California.

I declare under penalty of perjury
that the foregoing is true and correct.

Saul M. Weingarten

SAUL M. WEINGARTEN